Supreme Court, U.S.
FILED
DEC 16
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No. 98-633

In The

Supreme Court of the United States

October Term, 1998

WILLIE J. DUNN,

Petitioner,

v.

ALABAMA AGRICULTURAL AND MECHANICAL UNIVERSITY, ET AL.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITIONER'S REPLY BRIEF

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4 pp

PETITIONER'S REPLY BRIEF

Avers that this Court may choose not to consider Respondents' Brief because it fails to comply with Rule 33(b), Rules of the Supreme Court.

Admits the University fired Dunn in retaliation to ACT accusing him of taking its tests for three students. (Resp. br., p. 2; R. 303-4) Denies *McKinney* (Resp. br., pp. 8-9) supported dismissal of federal claims. Avers that *McKinney* held that where there was an adequate post-termination remedy, procedural due process would be satisfied. (R. 37-8) Since the Alabama Court of Civil Appeals refused to have considered material evidence, Dunn avers that his post-termination remedy was inadequate. *Zinermon v. Burch*, 494 U.S. 113, 124, 110 S.Ct. 975, 982, 108 L.Ed.2d 100 (1990).

The Alabama Legislature (§ 16-49-20 et seq., Code of Alabama) vested "exclusive jurisdiction, power and authority" [and] "management and control" (R. 78) of the University in the Board of Trustees. The University did not have the power nor authority to deny Dunn grievance rights. It was the state system itself that denied Dunn procedural due process without proper safeguards. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 423, 102 S.Ct. 1148, 1148-51, 71 L.Ed.2d 265 (1982). (Dunn contends that he was deprived of procedural due process under established grievance procedures.) *Id.* Too, "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Id. Zinermon*, 494 U.S. at 124, 110 S.Ct. at 982. (Resp. br., p. 9).

Under *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1930, 1923, 64 L.Ed.2d 572 (1980), Dunn was required to

make two allegations to state a claim for relief: (1) "that some person has deprived him of a federal right" and (2) "that the person who deprived him of that right acted under color of state law." *Id.* Counts I-III of the complaint (R.7-9) and counts I-III as amended (R.64-8) so stated. Dunn's federal constitutional claims depended upon his having a property right in continued employment. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 531, 538, 105 S.Ct. 1487, 1991, 84 L.Ed.2d 494 (1985). Avers that by virtue of Dunn's continued employment contract (R.408) he had acquired a property right in employment. Therefore, his complaint as amended stated a cause of action under 42 U.S.C. § 1983. *Id. Gomez; Maine v. Thiboutot,* 448 U.S. 1, 3, 100 S.Ct. 2502, 2503, 65 L.Ed.2d 555 (1980), *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429-30, 102 S.Ct. 1148, 1154-5, 71 L.Ed.2d 265 (1982).

Denies that Dunn was required to submit evidence admissible at trial to defect Respondents' motion for summary judgment based on this Court's holding under *Celotex.* (Resp. br., p. 12). *Celotex,* 477 U.S. at 324, 106 S.Ct. at 2553.

The opinion of the Alabama Court of Civil Appeals conflicts with this Court's holding in *Adicks, Anderson, Celotex, Gomez,* and *Logan.* It conflicts with it own opinion in *Curry v. Welborn Transportation,* 678 S.2d 158, 160 (Ala. Civ. App. 1996); and with that of the Alabama Supreme Court in *Rhodes v. Tractor & Equipment Co.,* 677 So.2d 194 (Ala. 1995) (reh.den.)

Avers that the issue of stigmatization was raised via "Motion To Alter Amend or Vacate Order Granting Defendants Summary Judgment" (R.367) and argued in open

court (R.506). Since Respondents never objected thereto, the issue is proper before this Court on the ground that it falls within the framework of deprivation of "substantive due process rights" (liberty and property). *Brennan v. Steward*, 834 F.2d 1248, 1256-7) (5th Cir. 1988).

Finally, Dunn demanded trial by struck jury. (R.12, R.71). The Seventh Amendment to the U.S. Constitution recognizes a right to a jury trial if the statute creates legal rights and remedies in an action for damages. Dunn contends that § 1983 so provides. *Carey v. Pipus*, 435 U.S. 247, 253-4, 98 S.Ct. 1042, 1046-7, 55 L.Ed.2d 252 (1978).

This Court is required to review the evidence in the light most favorable to Dunn. *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513 such that the substantive law will determine which facts are material. *Id.* 477 U.S. at 248, 106 S.Ct. at 2510.

The rights Dunn seeks to vindicate are protected under the Bill of Rights. Respondents have not denied this; in fact, they have not denied any facts or material allegations set forth in the Petition. Their only argument has been that Dunn's claims do not fall under federal law. *Gomez* holds to the contrary.

Dunn denies all factual statements and allegations set forth in Respondents' brief.

For the foregoing reasons, Dunn strongly suggests the grant of certiorari to protect substantive rights and to resolve the conflict.

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